No. 11748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director, United States Department of Justice, Immigration and Naturalization Service, District No. 16,

Appellant,

vs.

JOHN DELANEY,

Appellee.

APPELLANT'S BRIEF.

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Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the writ of habeas corpus proceeding under Section 752, R. S. February 13, 1925, C. 229, Section 6, 43 Stat. 940 (28 U. S. C. A. 452). The appellee was being held in the custody of the appellant in the County of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 463(a) of Title 28 U. S. C. A.

Statutes and Regulations Involved.

By Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887; 8 U. S. C. A. 153) Congress provided for the setting up of Immigration Boards of Special Inquiry, composed of members of the Immigration and Naturalization Service, and authorized such Boards to determine the admissibility of any alien seeking entry into the United States:

> "Such Boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported * * * in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, *the decision of a Board of Special Inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General.*" (Emphasis added.)

By Section 15 of the Immigration Act of February 5, 1917 (39 Stat. 885; 8 U. S. C. 151) Congress provided for the inspection of aliens arriving on vessels and that temporary removal for such examination would not constitute a "landing":

> "That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or send competent assistants to the vessels and there inspect all such aliens or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, *but such temporary removal shall not be considered a landing* * * *" (Emphasis added.)

By Section 16 of the Immigration Act of February 5, 1917 (39 Stat. 885-887; 8 U. S. C. 152) Congress provided for the examination of all aliens arriving in the United States and authorized immigrant inspectors to board and search for aliens any vessel in which they believed aliens are being brought into the United States:

> "All aliens arriving at port of the United States shall be examined * * * Immigrant Inspectors are hereby authorized and empowered to board and search for aliens any vessels * * * in which they believe aliens are being brought into the United States."

By Section 1 of the Immigration Act of February 5, 1917 (39 Stat. 874; 8 U. S. C. A. 173) Congress defined the term "seaman" as follows:

> "* * * that the term 'seaman' as used in this Act shall include every person signed on the ship's article and employed in any capacity on board any vessel arriving in the United States from any foreign port or place."

The inspection of seamen is further provided for by regulation as set forth in Section 120.17, Title 8, Code of Federal Regulations:

> "In addition to the medical examination hereinafter provided for, all seamen arriving in ports of the United States shall be regularly inspected by immigrant inspectors."

"Arriving from any foreign port or place" is defined by Section 120.3, Title 8, Code of Federal Regulations, as follows:

> " 'Arriving in the United States from any foreign port or place' means arriving in 'the United States,

and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmanian Canal Zone,' *from any port or place in a foreign country or in the Canal Zone* (Secs. 1, 19, 31, and 33 to 36 of the Immigration Act of February 5, 1917); (39 Stat. 874 ff.); (8 U. S. C. 173, 155, 165, 166, 168, 169, 171). * * *" (Emphasis added.)

Section 17, Act of February 5, 1917 (39 Stat. 887; 8 U. S. C. A. 153) and regulations made thereunder, in effect at the time of the instant proceedings, did not authorize the appellee to be represented by an attorney at the hearing before the Board of Special Inquiry except in the capacity of a friend or relative. Representation on appeal to the Attorney General from an adverse decision of the Board of Special Inquiry is authorized.

> "All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General."

The regulation made in pursuance of the above Act of Congress is found in Title 8, Code of Federal Regulations, Sec. 130.2, and provides with respect to representation by attorney that:

> "Hearing before the board 'shall be separate and apart from the public'; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed; *provided, first, that such friend or relative is not and will not be employed by him as counsel or attorney;* * * * that he is not an agent or a representative at any immigration station of an immigrant aid or other

similar society or organization; and * * * that he is either actually related to or an acquaintance of the alien." (Emphasis added.)

Representation by an attorney on appeal is provided for by regulation found in Title 8, Code of Federal Regulations, Sec. 136.1:

"An alien desiring to appeal may do so individually or through * * * any relative or friend or through any person, including attorneys permitted to practice before the immigration authorities."

Statement of the Case.

Petition for writ of habeas corpus was filed in the United States District Court for the Southern District of California, Central Division, on July 3, 1945 [R. 2-6, 616].[1]

Petition for the writ of habeas corpus was granted and made returnable on July 9, 1945 [R. 16].

Subject was released under court bond in the amount of Five Hundred Dollars on July 5, 1945 [R. 94].

Return to the writ was filed July 7, 1945 [R. 7-10, 16-17] and supplemental return was filed on December 20, 1946 [R. 17].

Traverse was filed on December 28, 1948 [R. 11-15, 17].

On January 14, 1947, the Court heard testimony on the petition for the writ and took the matter under submission [R. 59-103], on briefs to be filed [R. 17, 101, 103].

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[1]The references herein preceded by "R" are to the printed record on appeal.

The District Judge granted the writ and discharged the petitioner from technical custody and filed his opinion on February 21, 1947 [R. 16-45].

On May 28, 1947, findings of fact and conclusions of law were filed [R. 46-51] together with judgment [R. 52, 53].

Notice of appeal was filed on August 25, 1947 [R. 54].

Stipulation for the substitution of the party respondent was duly filed on September 26, 1947 [R. 57].

Summary of Facts.

Appellee denies that he is an alien and that he was born in Cork, Ireland [INS File 248].[2] He claims United States citizenship and that he acquired such citizenship through birth in Brooklyn, New York [INS File 254].

Appellee arrived at the port of San Pedro, California, aboard the vessel "Schenectady" on May 20, 1945, as a member of the crew serving in the capacity of Second Assistant Engineer [R. 10, 76, 98, 99, 100]. The "Schenectady" was a commercial oil tanker owned and operated by the Deconhil Shipping Company, as agents for the War Shipping Administration [R. 99, 100]. The appellee was returning from a continuous voyage which began with the departure of the vessel "Schenectady" from the port of San Pedro on June 10, 1944 [R. 20, 98, 100]. The crew list described the voyage as "foreign"

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[2]The references herein preceded by "INS File" are to the Immigration and Naturalization Service record containing the complete report of the Board of Special Inquiry, the decisions of the Commissioner and the Board of Immigration Appeals relating to the exclusion of the appellee and to the page numbers indicated therein by red pencil figures [R. 55].

[R. 100]. The appellee's continuous discharge book also described the voyage as "foreign" [R. 76].

Appellee testified that the vessel "Schenectady" touched at various foreign ports in the South Pacific [R. 69, 70, 71; INS File 222], supplying oil to the British and United States Fleets through the "mother ship" or "store ship" "in port: wherever we could find her: whereever she would meet us": but "not on the high seas" [R. 71]. Appellee presented certain certificates of the Maritime Service confirming his service with the United States Merchant Marine in the war area, including the Pacific War Zone Bar, Merchant Marine Combat Bar, Mediterranean Middle East War Zone Bar, and also the Atlantic War Zone Bar [R. 73].

The "Schenectady" was boarded by an Immigrant Inspector of the Immigration and Naturalization Service upon its return to San Pedro, California, on May 20, 1945 [R. 7, 9, 10]. Appellee signed and swore to a statement before the inspector on the date of the arrival of the vessel on May 20, 1945, that he was a citizen of the United States, and that he had been born in Brooklyn, New York, on November 14, 1898 [INS File, Ex. 8, 176, 244]. The inspector was in possession of a copy of the appellee's alien registration record executed December 16, 1940 [R. 24; INS File, Ex. 2, 182] wherein he had claimed British nationality and that he had been born in Cork, Ireland, on November 14, 1897, and had first entered the United States on November 14, 1924, aboard the vessel "Nehian" [R. 7, 24; INS File, Ex. 2, 182, 251, 252]. There is no testimony as to the conversation between the Immigrant Inspector and the appellee upon the date of his arrival on May 20, 1945. He did, however, admit that he signed an "Oath of Return-

ing Citizen" before an Immigrant Inspector on the date of his arrival [INS File, Ex. 8, 176, 244]. On the same date of the arrival of the vessel the "Schenectady" an Immigrant Inspector of the Immigration and Naturalization Service served on the master of the vessel a notice and order to deliver the appellee to the Immigration Office, Terminal Island, for further examination [R. 7, 9, 10, 21, 22].

Before the District Court on January 14, 1947 appellee testified that upon the arrival of the vessel "Schenectady" on May 20, 1945 at San Pedro he had been permitted by the captain of the vessel to go ashore and remained in Long Beach, California, overnight and that it was not until the following day (May 21, 1945) that he was notified by the officers of the vessel that he was to report to the Office of the Immigration and Naturalization Service, Terminal Island [R. 22, 78, 79].

At a hearing before a Board of Special Inquiry at the Office of the Immigration and Naturalization Service, Terminal Island, on May 21, 1945, appellee admitted that he registered at the Post Office, Long Beach, California, as an alien on December 16, 1940, and that when so registering he claimed British citizenship; that he had been born in Cork, Island, on November 14, 1897, and that he had last and first entered the United States on the vessel "Nehian" at Wilmington, North Carolina, on "November 14, 1924"; that he had applied for naturalization on "December 13, 1924" but had not received his first papers; that he had been in the "British Navy" [INS File, Ex. 2, 182, 252, 251]. Appellee explained that he had registered as an alien because he had asked several people for advice since he could get no proof of his birth in New York and they told him, "The best thing I

could do was to go and register at the post office" [INS File 252, 248].

At the time appellee registered as an alien on December 16, 1940 he was employed at the Craig Shipyards. When he secured employment with the Craig Shipyards on October 2, 1940 he represented himself to be a United States citizen [INS File 301, 300].

Appellee admitted that when applying for his engineer's license and Coast Guard card he had submitted the affidavits of William Giles and Kenneth Higgins as proof of his birth in the United States [INS File, Ex. 3, 181, 245; Ex. 4, 180, 245]. Appellee further testified before the Board of Special Inquiry that he first met Kenneth L. Higgins about 1945, and that he had known Mr. William Giles from about 1932 or 1933, and that neither Mr. Higgins nor Mr. Giles knew his parents [INS File 241]. In explanation of Mr. Higgins' statement that he did not know he was signing an affidavit of birth but that he thought it was a reference, appellee testified, "Well, maybe he did—didn't know—I told him I had to get a reference in regard to getting my birth certificate, yes" [INS File, Ex. 9, 175-171, 244]. The address "423 Main Street, Long Beach", shown as the address of William Giles in his affidavit, was found to be nonexistent [INS File 232]. Appellee admitted that he had signed the name "William Giles" to the affidavit purporting to be the affidavit of William Giles certifying to appellee's birth in the United States. This latter testimony is quoted as follows [INS File, Ex. 3, 181, 245, 212]:

> "Q. You had a Mr. William Giles and a Mr. Kenneth L. Higgins execute affidavits in support of your birth in the United States. Did either of those men of their own personal knowledge know of your

birth in the United States? A. No, only what I told them.

Q. Is William Giles an educated man? A. I guess he is. He's a pretty old man, around 65.

Q. Is he able to sign his name? A. Oh, I guess so—oh, yes.

Q. Did he sign his name to this affidavit [Ex. "3"]? A. No, he was sick at the time, and he gave me the power of attorney to go ahead and sign his name for him.

Q. Then did you write the name of William Giles on this affidavit [Ex. "3"] before a notary public on September 29, 1943? A. Did I? Yes.

Q. Did you show the notary public a power of attorney authorizing you to sign the name of William Giles? A. Yes.

Q. Where is that power of attorney? A. It was merely a verbal power of attorney."

Appellee gave the following testimony concerning where he believed he had been born [INS File 248, 246]:

"Q. Did you ever really think that you were born in Cork, Ireland? A. No.

Q. When did you first begin to believe that you were born in Brooklyn, New York? A. In 1941, when I wrote to Philadelphia regarding my parents' naturalization. I got no answer. Then I wrote to the Marriage License Bureau and got a record of my parents' marriage.

Q. Then before 1941 you were in doubt as to the place of your birth? A. Yes.

Q. Well, when did you first get the idea that you were born in Brooklyn, New York? A. Way back when my foster mother took me back to Ireland. I

do remember that when my father put me in school he registered me as a citizen of the United States.

Q. What schools did you attend in Ireland? A. The national school Shambaley, County Cork, and Carragline national school in County Cork."

Investigation was conducted through the United States Consular Service in Ireland [INS File, Ex. 20, 321, 306]. Examination of the school registry of the Carrigaline Boys School in Ireland for the period January 12, 1891 to February 4, 1920 showed only two entries bearing the surname "Delaney", one "John Delaney" and the other "Jeremiah", brother of John. Although appellee testified he had gone to this school as a boy, he denied that such record related to him because he stated he had no brothers [INS File 234].

A birth record was located showing the birth of a John Delaney on October 13, 1897, at Belrose, Bandon, County Cork, the son of Jeremiah and Helena Delaney, nee Hawks. Appellee denied that this record related to his birth or that the names of the parents shown therein referred to his parents [INS File, Ex. 20, 321, 306].

Appellee admits that information shown on copy of manifest of the British vessel "Ninian" covering its arrival at Wilmington, North Carolina, on November 17, 1924 from Manchester, England, referring to "John Delaney", relates to appellee's arrival as a seaman on the said vessel and that he supplied the information that his nationality was British, his race Irish, and that he was twenty-eight years of age when he shipped on that vessel on October 27, 1924 [R. 25, 26; INS File, Ex. 1, 183, 252].

Appellee remained in the United States as a "deserting seaman" upon the occasion of the arrival of the vessel "Ninian" on November 17, 1924 [INS File, Ex. 1, 183, 252, 201] and continued to reside in the United States until his departure on the oil tanker "Schenectady" on June 10, 1944 [INS File 221].

Appellee stated he had shipped out of the United States in the early part of 1924 and that he had missed his vessel on its return from Liverpool, England, and that he had gone to Manchester, England, and shipped as a seaman on the vessel "Ninian" on which vessel he arrived in the United States on November 17, 1924 [INS File 222].

Appellee explained that he had given the information that his nationality was British when signing on the vessel "Ninian" at Manchester, England, on October 27, 1924 because "They wouldn't hire American citizens" [INS File 253, 254].

Appellee testified that he had never obtained an immigration visa from an American Consul or paid a head tax as an alien when entering the United States [INS File 243].

Appellee admitted employment by the United States Coast and Geodetic Survey and that copy of "Notice of Shipment" of that agency, dated November 18, 1924, related to his enlistment with such agency for the period November 18, 1924 to the time of his discharge on April 28, 1925 at Jacksonville, Florida. This document shows signature "J. Delaney", "next of kin—mother, Mary Delaney, Cork, Ireland", and that appellee was born at "Cork, Ire." on "January 14, 1897", "citizenship, alien", "intention declared" [INS File, Ex. 13, 167, 201, 202, 233].

He further admitted that copy of a document entitled "Discharge from the United States Coast and Geodetic Survey", showing "J. Delaney" had served aboard the United States Coast and Geodetic Survey vessel "Lydonia" and had been discharged on April 28, 1925, related to him. This document shows appellee to have been born in "Cork, Ireland", giving his height as "five feet six", color of hair "red" [INS File, Ex. 14, 166, 199, 201].

While appellee admits that the above two records of the United States Coast and Geodetic Survey relate to him, he denies that he claimed to have been born in Ireland, but claims that such information was copied from his discharge papers which he received from the vessel "Ninian" [INS File 202, 201].

Appellee claimed to have been in the United States during the First World War. A draft registration card was found in the name of "John Patrick Delaney", signed "John P. Delaney", giving description of registrant as "tall", "blond hair", and showing birth in the United States on September 28, 1897. Appellee first testified that he filled out his draft registration form himself and that he had signed it. He further testified that he had never used the name of "Patrick". He later testified that he believed the form was filled out by someone else and attributed the discrepancies of "tall" and "blond hair" and birth date and middle name to that circumstance. Notwithstanding the discrepancies, appellee testified that he believed the record related to him [INS File, Ex. 18, 162, 192, 191, 189, 188, 187].

The names "John Patrick Delaney" and "John P. Delaney" were written by appellee and comparison was made by the Board members with the signature and description

on the draft registration, as against the signature and description of appellee appearing on "Notice of Shipment" form of the United States Coast and Geodetic Survey Service, made on November 18, 1924 [INS File, Ex. 18, 162; Ex. 19, 161, 189; and Ex. 13, 167, 201]. The Board of Special Inquiry concluded that because of the lack of similarity in the description and signatures the Draft Registration record does not relate to appellee [INS File 186].

Appellee presented copy of marriage record of the Philadelphia, Pennsylvania, Department of Public Health, issued December 1, 1943, certifying to the marriage of "M. Delaney" to "Bridget Whalen" on October 22, 1896, and testified that it related to the marriage of his parents. He first testified that his mother's name was "Margaret", but later changed and said that her name was "Bridget" [INS File, Ex. 17, 163, 193]. He testified that he knew his parents were married in Philadelphia because his father told him that when appellee was a boy. Further, that he had secured a copy of their marriage record in 1938 or 1937 when some lawyer had told him that if he could get a copy of their marriage record that would make him a citizen [INS File 203].

Appellee admitted requesting the Social Security Board on July 26, 1943 to correct his record with that agency to show his date of birth as "November 14, 1898"; birthplace, "Brooklyn, New York"; mother's maiden name as "Mary Grady"; and father's name as "Michael John Delaney". He explained that "Mary Grady" was his stepmother and that he should have given the name of his mother [INS File, Ex. 11, 169, 204; Ex. 12, 168, 204, 189].

Extensive investigation was conducted in New York by the Immigration and Naturalization Service to locate employment or other records relating to the appellee or persons who knew the appellee. The appellee testified that he had been employed by the Morse Dry Dock Company and the Tebos Company, but when confronted with an employment record showing the following information he disclaimed that such record related to him [INS File, Ex. 22, 315, 304.]:

> "We have an 'application for employment,' Morse Dry Dock and Repair Company, dated September 10, 1926. This John Delaney gave his address as 169—23rd Street, Brooklyn, N. Y., his age as twenty-nine, and single. According to the application he was born in Ireland and had taken out first papers in Jacksonville, Florida, 1924. This Mr. Delaney gave Tebos as his last employer, from 1925 to 1926, and his occupation as a burner. Robbins is listed as his employer in 1924."

Appellee testified that he has never been married [INS File 217]; that he has no living relatives unless it be a half-sister who may still be living in Ireland but he doesn't know her whereabouts [INS File 235]. He admits that Rosemary McArdle, listed as his cousin on departure manifest of the "Schenectady" is no relation to him; that he merely listed her as his next of kin in the event something happened to him on his voyage beginning June 10, 1944 [INS File 216].

Appellee testified that his mother died when he was a week old, he believes in Brooklyn, New York, and he does not know where she is buried; that he had been taken to Ireland from the United States by his step-mother when he was two or three years old [INS File 236, 210]; and that he had returned to the United States when he

was about fifteen or sixteen on the vessel "John Ludgate." A search for the arrival records of this vessel during the period 1913 to 1917 fails to disclose a record of the appellee's claimed arrival [INS File, Ex. 10, 170, 230, 233].

In response to the question "Where were you residing in the year 1920 when the census was taken," appellee replied, "I was at sea" [INS File 241].

Appellee testified his father was born in Cork, Ireland. Relative to his father's possible naturalization he testified on May 21, 1945, as follows [INS File 254]:

> "Q. Of what country was he a citizen? A. To the best of my belief he was a citizen of this country when he died.
>
> Q. Did your father naturalize in the United States? A. That I don't know. I couldn't say.
>
> Q. When did he come to the United States? A. That I don't know either.
>
> Q. How long did he live in the United States? A. As far as I know he lived here many years, I think.
>
> Q. When and where did your father die? A. In Ireland—I don't know when."

On May 22, 1945, appellee had the following to say regarding his father's naturalization [INS File 246, 241]:

> "Q. Did your father ever tell you that he had naturalized in the United States? A. Yes.
>
> Q. When did he tell you this? A. When I went to school. He had to give that record at school —that he was an American citizen.
>
> Q. Did he tell you when and where he naturalized in this country? A. To the best of my knowledge he said Philadelphia.
>
> Q. Do you know where your father lived in Philadelphia? A. No. I tried to remember those streets, but I can't remember.

Q. Did you ever see his naturalization papers? A. No.

Q. Do you know in what court in Philadelphia your father may have naturalized? A. No.

Q. Do you know the names of the persons who appeared as witnesses for him? A. No.

Q. Can you give us any information which might help to locate a record of your father's alleged naturalization? A. No, I can't."

With respect to the citizenship of his mother, appellee testified as follows [INS File 254, 246]:

"Q. What was your mother's name and where was she born? A. She was born in Ireland. Her name was Margaret Whalen.

Q. Did she ever live in the United States? A. Yes.

Q. Did she become a citizen of the United States? A. Well, I guess so.

Q. When and where did she die? A. She died in Philadelphia, Pennsylvania. I think it was in Pennsylvania anyway. I don't know when she died.

Q. * * * do you know how she acquired citizenship? A. I guess through her brother. I guess she was naturalized here.

Q. Do you know when and where? A. In Philadelphia, as far as I know. I don't know the date."

Appellee gave the following testimony with reference to service in the British Navy [INS File 214, Ex. 9, 175-171, 244]:

"Q. On your alien registration record you list military service with the British Navy; when did you serve in the British Navy? A. I never did serve in the British Navy; that was a reference that I put down there.

Q. Why did you give the British Navy as a reference? A. Well, I had nothing else to give. I had to give some reference and I didn't think of anything else to give."

When confronted with the admission to the witness Kenneth L. Higgins, asserted to have been made by appellee regarding his British Naval Service, appellee replied: "He said I was an apprentice in the King's Navy. I never said anything like that. It was the first time I ever heard of that."

"Q. Did you ever serve in any foreign army or navy? A. No."

Further, appellee testified before the Board of Special Inquiry on May 21, 1945, that he had never served in the United States Army, Navy, or Coast Guard [INS File 253]. Later, however, he testified before the Board of Special Inquiry on September 18, 1946, that as second assistant engineer in the American Merchant Marine he held a reserve commission in the United States Navy as a lieutenant. He stated his duties aboard the "Schenectady" had been to take care of the boiler room [INS File 303]. In testifying before the Court on January 14, 1947, he stated the vessel carried "6-inch and 8 anti-aircraft guns" and that the gunnery men were made up of members of the United States Navy. He further testified that the captain of the "Schenectady" belonged to the "Reserve" [R. 71].

Although appellee showed on his alien registration that he had applied for "first papers" and although there was a reference on his Geodetic Survey record that he was an "alien," "intention declared," appellee testified that he had never declared his intention or taken out a "first paper" [INS File 215].

SUMMARY OF ARGUMENT.

POINT I.

The Determination of the Board of Special Inquiry Affirmed by the Board of Immigration Appeals Is Not Open to Review by the United States District Court on a Writ of Habeas Corpus.

(a) There was substantial evidence to support the finding of alienage and inadmissibility by the administrative agency.

(b) Right to admission based upon a claim of United States citizenship does not entitle appellee to a hearing *de novo* before the District Court in Writ of Habeas Corpus proceedings.

(c) It has been judicially recognized for more than forty years that the administrative agency charged with the administration of the immigration laws is empowered to make a final determination on the issue of right to enter the United States even though such right is based upon a claim of United States citizenship.

(d) It is equally well established that courts may not substitute their judgment for that of the Immigration Boards and the Attorney General on matters of fact where there has been no denial of a fair hearing.

POINT II.

Appellee Was Arriving From a Foreign Port or Place Upon His Return to the Port of San Pedro, California, on May 20, 1945, Aboard the Oil Tanker "Schenectady."

(a) The vessel put in at various foreign ports in the South Pacific on the voyage in question which commenced with its departure from San Pedro, California, on June

10, 1944, and ended upon its return to the same port on May 20, 1945. Within the contemplation of the immigration laws, appellee was arriving from a foreign port or place notwithstanding the fact that appellee was a reserve officer of the United States Maritime Service and that the vessel "Schenectady" was being operated by the Deconhil Shipping Company, as agents of the War Shipping Administration.

(b) The question of whether or not appellee was arriving from foreign must now be determined in the light of the holding of the Supreme Court in the case of *Delgadillo v. Carmichael,*[3] decided subsequent to the decision of the District Court in the instant case.[4] Appellee denies that he knew the destination of the vessel when it departed. The evidence will show that while appellee could not have known the specific foreign port to which the vessel was destined at the time of departure, because the captain of the vessel did not receive such information until the vessel had put out to sea, the circumstances of departure and the evidence are sufficient to show actual knowledge on the part of appellee that the vessel was in fact proceeding to some foreign destination.

(c) The conclusion of the District Court that if appellee was in fact an alien he was not amenable to the immigration laws for the reason that in legal contemplation he had not left the United States because he was in fact a member of the United States Military Service is not tenable under the authorities and evidence in this case.

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[3]333 U. S. ....., 68 S. Ct. 10, decided November 10, 1947.

[4]*Ex parte Delaney,* 72 F. Supp. 312, decided February 21, 1947.

ARGUMENT.

POINT I.

The Determination of the Board of Special Inquiry Affirmed by the Board of Immigration Appeals Is Not Open to Review by the United States District Court on a Writ of Habeas Corpus.

At the hearing on the writ the Court completely re-examined the evidence considered by the administrative agency and on the issue of alienage concludes that [R. 43]:

> "This court * * * will require no greater documentary evidence of his citizenship than that which was acceptable to the United States Maritime Service when he joined that service. * * * John Delaney is not a *homo-sina patria,* but a citizen of the United States *jus soli* and is not subject to exclusion proceedings."

The Court may not substitute its opinion for that of the Attorney General because Congress made the decision of the administrative agency charged with the administration of the immigration laws final so long as the proceeding meets the requirement of due process.

Applicable Statutes.

Congress specifically placed the power to determine admissibility in the Attorney General and made his decision final, by Section 17 of the Immigration Act of February 5, 1917 (8 U. S. C. A. 153), which provides in part:

> "* * * In every case where an alien is excluded from admission into the United States, * * * The decision of a Board of Special Inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General."

As early as 1905 the Supreme Court, speaking through Mr. Justice Holmes, construes the statutory authority placed in the administrative agency charged with the adminstration of the immigration laws, to include the authority to make a final determination even where admission is sought on the basis of a claim to United States citizenship:[5]

> "It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—*as well when it is citizenship as when it is domicile* * * * If, for the purpose of argument, we assume that the 5th amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. *That the decision may be entrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in Nishimura Ekiu v. United States,* 142 U. S. 651, 660, 35 L. Ed. 1146, 1149, 12 S. Ct. 336, and in Fong Yue Ting v. United States, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 S. Ct. 1016, before the authorities to which we already have referred." (Emphasis added.)

The Supreme Court again in 1912, speaking through Mr. Justice Hughes, affirmed the rule that the Act of Congress makes "the decision of the appropriate immigra-

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[5]*U. S. v. Ju Toy,* 25 S. Ct. 644, 646, 198 U. S. 253, 49 L. Ed. 1040.

tion officer final unless reversed on appeal to the Secretary of Commerce and Labor. And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the court."[6] The foregoing principle was reaffirmed in a decision decided in 1929, and the Supreme Court, speaking through Mr. Justice Sanford, said:[7]

> "* * * *The mere fact that he claimed to be a citizen did not entitle him under the constitution to a judicial hearing;* and that unless it appeared that the departmental officers to whom Congress had entrusted the decision of his claim had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way and abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of *habeas corpus* without proceeding further." (Emphasis added.)

In considering an appeal in 1940 from the decision of the District Court denying a writ of *habeas corpus* in the case of an applicant for admission who claimed birth in the United States and who was excluded by the Immigration and Naturalization Service, this Honorable Court emphasizes the requirement of the courts

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[6]*Tang Tun v. Edsell,* 32 S. Ct. 359, 361, 23 U. S. 673, 56 L. Ed. 606.

[7]*Quon Quon Poy v. Johnson,* 47 S. Ct. 346, 348, 273 U. S. 352, 358, 71 L. Ed. 680.

to observe the foregoing well-established construction of the immigration laws, in the following words:[8]

> "As has again and again been pointed out, the courts may not substitute their judgment for that of the immigration boards on matters of fact. *Unless it appears that the applicant has been denied a fair hearing, the factual decisions of the immigration authorities are final if supported by any substantial evidence.* Del Castillo v. Carr, 9 Cir., 100 F. (2d) 338, 339; Wong Gim Ngoon v. Proctor, 9 Cir., 93 F. (2d) 704; Gee Nee Way v. McGrath, 9 Cir., 11 F. (2d) 326, decided April 19, 1940." (Emphasis added.)

Was There Any Substantial Evidence to Support the Finding of the Board of Immigration Appeals?

Based on a long line of judicial precedent, the law is firmly established that if there was substantial evidence to support the Board's findings, the decision of the Board of Special Inquiry, approved in due course by the Board of Immigration Appeals, under the authority delegated to it by the Attorney General, is final and is subject neither to review nor reversal by the District Court on the merits in *habeas corpus* proceedings. It is equally well established that the District Court was without authority to try *de novo* the issues even though it con-

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[8]*Lee Chock Hon v. Proctor,* 9 Cir., 112 F. (2d) 246, 247. See also *Ex parte Wienke,* 31 F. Supp. 733, decided in 1940.

cluded that the Immigration Board was wrong in its decision on the factual questions.[9]

> "* * * want of due process is not established by showing merely that the decision is erroneous, Chin Yow v. United States, *supra,* 208 U. S. 13 (28 S. Ct. 201), or that incompetent evidence was received and considered. See Tisi v. Tod, 264 U. S. 13, 133, 44 S. Ct. 260, 68 L. Ed. 590. Upon a collateral review in *habeas corpus* proceeding, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial."

The Court concedes [R. 42] that it: "* * * is well aware of the fact that there are contradictory and/or untrue statements in the record which give considerable weight to the contention of the Immigration and Naturalization Service that John Delaney is not an American citizen by birth, and which warrant his being excluded from this country, all of which have been considered by the court * * *." The District Court could only examine the proceedings to determine whether they had been properly held and whether there was some substantial evidence to support the findings.

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[9] *Vajtauer v. Commissioner,* 273 U. S. 103, 106, 47 S. Ct. 302, 304, 71 L. Ed. 560.

THE DISTRICT COURT MAY NOT SUBSTITUTE ITS OPINION FOT THAT OF THE IMMIGRATION BOARD ON THE QUESTION OF CREDIBILITY OF THE EVIDENCE.

The District Court in referring to the "contradictory statements and/or untrue statements, of John Delaney" states that it "believes John Delaney has satisfactorily answered the questions as to why he represented himself to be a British subject in November of 1924, when he shipped on the S. S. 'Nehian' in 1924; and registered as a friendly alien during World War two * * *" [R. 42, 43].

The foregoing authorities clearly establish that the Court is not authorized to substitute its judgment for that of the Immigration Board and the Attorney General on factual issues and the credibility of the evidence. This is true even though such factual issue involves a question of citizenship, providing there is any substantial evidence to support the finding of alienage by the Immigration Board and the Attorney General.

That the District Court substituted its opinion for that of the Immigration Board on the question of the credibility of the evidence is shown by the statement, "This Court * * * will require no greater documentary evidence of his citizenship than that which was acceptable to the United States Maritime Service * * *" [R. 43]. Neither the standard nor the quantum of documentary evidence required could be measured by a requirement of the United States Maritime Service. What that Service required was wholly immaterial. Furthermore, the documentary evidence submitted to the Maritime Service consisted of the affidavits of Kenneth L. Higgins who, appellee admits, had no personal knowledge of his place of

birth or nationality and the purported affidavit of William Giles, the signature to which appellee admits he forged before the notary public.

In the execution of these affidavits the appellee shows a disposition to regard the end as justifying the means. While he apparently meant no harm, such conduct could properly be considered by the Immigration Board in determining credibility. Other examples of this attitude are shown in his testimony before the Immigration Board of Special Inquiry. For example, he testified that he had never taken out a first paper for naturalization or declared his intention to become a citizen at any time. Yet the "Notice of Shipment" in the records of the United States Coast and Geodetic Survey, executed on April 28, 1925, under the item "citizenship" shows "alien, intention declared." When confronted with the information on this form, showing his birth place as Cork, Ireland on January 14, 1897, he denied that he had furnished the information shown on the form and testified that it had been copied from his discharge papers from the vessel "Ninian" on which he testified he arrived in Wilmington, North Carolina, November 17, 1924. When confronted with the information that the copies of the manifest record of the vessel "Ninian" upon the occasion of that arrival reflected that appellee was reported on November 19, 1924 as a deserting seaman and that it was unlikely that he would have received any discharge papers, appellee nevertheless maintained that he had received a certificate from the vessel. He first testified that this certificate merely showed the date of his signing on and when he was paid off. He then qualified this statement by saying that he believed it also showed his nation-

ality [INS File 201]. The import of his testimony is to the effect that whatever papers he received from the vessel "Ninian" not only showed his birth place as Cork, Ireland on January 14, 1897, but also showed him to have declared his intention. It is unlikely that he would inform the officers of the British vessel "Ninian" that he had declared his intention to become a citizen of the United States when he states that he told them that his nationality was "British" because "they wouldn't hire American citizens" [INS File 253, 254].

Again he is unable to give any satisfactory explanation of why he included the information, when registering at the post office at Long Beach on December 16, 1940 as an alien, following the item " 'date of application for naturalization,' 'December 13, 1924,' " " 'date of first papers' 'not received.' "

'Appellee explains that he gave the information "Nationality, British" shown on the copy of manifest of the vessel "Ninian" at the time he shipped on that vessel on October 27, 1924 at Manchester, England, because he would not have been hired otherwise. The Immigration Board was not precluded from weighing the explanation given by appellee against other evidence which it may have considered more credible. There was evidence which showed appellee had consistently claimed birth in Cork, Ireland and British nationality at a time when the motive for falsely claiming citizenship was not so strong as it has been during the war years. When appellee arrived at Wilmington, North Carolina on the vessel "Ninian" on November 17, 1924, he was recorded on the ship's manifest as being of British nationality [INS File Ex. 1, 183]. The following day (November 18, 1924) the

"Notice of Shipment" form executed before the United States Coast and Geodetic Survey shows birth in "Cork, Ireland" on "January 14, 1897," "alien, intention declared" [INS Ex. 13, 167]. Six months later (April 28, 1925) appellee is shown by his "discharge certificate," issued by the latter service and signed by the appellee, to have been "born at Cork, Ireland" [INS file Ex. 14, 166].

The Board reasonably could have concluded that appellee had no disagreement with the facts shown on his "Discharge Certificate" otherwise he would have protested the showing of such information thereon [INS File, Ex. 14, 166, 199].

Although the appellee denied that the employment record of the Morris Dry Dock and Repair Company related to him [INS File, Ex. 22, 315, 304], the Immigration Board was entitled to draw its own conclusion as to whether or not such record related to the appellee. He had admitted working for this company at about the time shown in the employment record. In addition to the record showing appellee to have been aged 29, single, and born in Ireland, it also contained the information that he "had taken out first papers in Jacksonville, Florida, 1924." It is significant that the "Notice of Shipment" record of the United States Coast and Geodetic Survey executed in 1924 shows "alien, intention declared" and that his discharge from such service occurred at Jacksonville, Florida [INS File, Ex. 13, 167, 201-02, and Ex. 14, 166, 199].

In view of the various admissions of the appellee to birth in Cork, Ireland, and alienage and the failure of the appellee to produce any witnesses or documentary evidence to cast doubt upon these early admissions of alienage and the fact that the appellee had registered as an alien when there was a possibility of invoking criminal punishment

for failure of an alien to register, coupled with the further fact that an exhaustive investigation both in the United States and in Ireland failed to establish the birth of the appellee in the United States or that he had acquired United States nationality clearly overcomes any presumption of United States citizenship which might arise from the mere fact of residence in the United States and the unsupported claim of appellee to birth in this country [R. 41]. Even in a deportation proceeding where the burden of proof is on the Government, the subject of such proceedings is not "* * * protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case."[10]

SHOULD THE PROCEEDING HAVE BEEN UNDER THE AUTHORITY TO DEPORT RATHER THAN TO EXCLUDE IN THIS CASE?

Congress in setting up Boards of Special Inquiry provided in Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887, 8 U. S. C. A. 153), that:

> *"Such Boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported* * * *." (Emphasis added.)

By Section 15 of the Immigration Act of February 5, 1917 (39 Stat. 885, 8 U. S. C. A. 151), Congress further provided for the inspection of all arriving aliens and expressly stated that a temporary removal for further examination would not constitute a "landing":

> "That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of

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[10] *U. S. v. Tod,* 44 S. Ct. 54, 56, 263 U. S. 149, 154, 68 L. Ed. 221.

> the proper immigration officials to go or send competent assistants to the vessels and there inspect all such aliens or *said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing* * * *." (Emphasis added.)

The Supreme Court in construing a similar act of Congress with respect to the temporary removal of aliens stated the law to be as follows:[11]

> "By section 8 'the proper inspection officers' are required to go on board any vessel bringing alien immigrants, and to inspect and examine them and may for this purpose remove and detain them on shore, without such removal being considered a landing * * *. Putting her in the mission house as a more suitable place than the steamship, pending the decision of the question of her right to land * * * left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship."

The District Court states that it "* * * will hold that exclusion proceedings in this case were proper to determine the question involved" [R. 24]. It has proceeded, however, to consider appellee's case as falling under Section 19 (a) of the Immigration Act of February 5, 1917

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[11]*Nishimura Ekiu v. United States*, 12 S. Ct. 336, 339, 142 U. S. 651, 35 L. Ed. 1146. Some of the problems of administering the immigration laws in connection with air travel if temporary landings were not authorized is shown in the decision of the court in the case of *United States v. Karnuth*, 74 F. Supp. 657.

(39 Stat. 889, 8 U. S C. A. 155), which statute refers to the authority of the Attorney General to make final decisions in deportation proceedings only and not in exclusion proceedings [R. 18].

The authority of the Board of Special Inquiry and the Attorney General to make final decisions in exclusion proceedings as distinguished from deportation proceedings is found in Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887, 8 U. S. C. A. 153). The District Court concludes that the excluding proceeding was followed by appellant rather than deportation proceedings "* * * for the reason, obvious to the court," that the burden of proof is upon the alien in exclusion proceedings, whereas in deportation proceedings the burden of proof is upon the Government [R. 23].

At no time in his testimony before the Board of Special Inquiry did appellee ever disclose that he had gone ashore and remained there overnight before proceeding to the immigration office. The first time appellee made such a claim so far as the record reflects was in his testimony before the District Court on January 14, 1947 [R. 78, 79].

While there is no testimony as to what conversation was had with appellee on the date of his arrival May 20, 1945, it does appear that he was contacted by an Immigrant Inspector. Appellee testified before the Board of Special Inquiry and identified as having been signed by himself on May 20, 1945, an "Oath of a Returning Citizen." This was the date of his arrival on the vessel "Schenectady" at the port of San Pedro, California [INS

File, Ex. 8, 176, 244]. At 10:15 a m. on the same date the Immigrant Inspector served a notice and order on the master of the "Schenectady" to deliver appellee to the Immigration Station, Terminal Island, for "further examination" [R. 9, 10].

It is true, however, that had it been known to the Immigration and Naturalization Service that the master of the vessel had permitted the alien to remain on land overnight before proceeding to the immigration office, exclusion proceedings would have been pursued rather than deportation proceedings for the reason, as contended before the District Court, that the law permits a temporary landing or removal to a place where a Board of Special Inquiry may be convened to hear the testimony of an applicant for admission, but certainly not with any ulterior motive of giving the Government the advantage of the burden of proof.

Very often an applicant for admission who is ill on arrival, after primary inspection by an Immigrant Inspector, may be removed to a private hospital by its employees for treatment, and hearing by the Board of Special Inquiry deferred for several days. Aircraft landing at interior points in the United States from foreign, during the night time, and where an alien passenger or crew member, after primary inspection, is ordered to be delivered for hearing before an immigration board, such alien applicant is frequently permitted lodging at a hotel or to go to his own home or friends' home to spend the night before appearing for a hearing before the Board of

Special Inquiry to determine his right to admission into the United States.

With few exceptions all ports of entry are within the United States and the alien seeking to have his admissibility determined is already physically within the United States. He has, however, been inspected at the International land boundary or on the vessel before going ashore and permitted to go to an immigration office for further examination because the primary inspector is not satisfied that the alien-applicant is entitled under the law to be landed without further examination. In these circumstances *"such temporary removal shall not be considered a landing."*[12] (Emphasis added.)

The narrow construction placed on the law by the District Court, if permitted to stand, would upset a construction of the law long followed by the Immigration and Naturalization Service and greatly impede it in the handling of arriving applicants. Courts should give consideration to the construction of statutory language placed thereon by those entrusted by law with executive and administrative functions, and particularly so in cases where the statute authorizes the promulgation of regulations by the officers charged with the duty of executing the statute.[12a]

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[12]Section 15, Act of Feb. 5, 1917 (8 U. S. C. A. 151).

[12a]*Jacobs v. Prichard,* 32 S. Ct. 289, 223 U. S. 200, 56 L. Ed. 731; *U. S. v. Cerecedo,* 28 S. Ct. 532, 209 U. S. 337, 52 L. Ed. 821; *Moy Chee Chong v. Weedin,* 9 Cir., 28 F. (2d) 263.

POINT II.

An "Arrival" From a Foreign Port or Place Was Made by Appellee Upon His Return to the Port of San Pedro, California, on May 20, 1945, Aboard the Oil Tanker "Schenectady."

After Touching at Various Foreign Ports in the South Pacific an "Entry" Has Been Made Within the Contemplation of the Immigration Laws, Notwithstanding the Fact That Appellee Was a Reserve Officer of the U. S. Maritime Service and That the Vessel Was Being Operated by the Deconhil Shipping Company, as Agents of the War Shipping Administration, on This Voyage.

In its most recent pronouncement on this subject the Supreme Court in referring to earlier decisions of the Court on the question, states there is language in such decisions "* * * which taken from its context suggests that every return of an alien from a foreign country to the United States constitutes 'entry' within the meaning of the act. Thus in the *Smith* case it was stated, 289 U. S. at page 425, 53 S. Ct. at page 667, 77 L. Ed 1298, that 'any coming of an alien from a foreign country into the United States whether or not such coming be the first or any subsequent coming' is such an 'entry.' But those were cases where the alien plainly expected or planned to enter a foreign port or place. Here he was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port as his destination. His itinerary was forced on him by wholly fortuitous circumstances."[13] The Supreme Court, speaking through Mr. Justice Douglas in the *Delgadillo v.*

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[13]*Delgadillo v. Carmichael,* 333 U. S. ....., 68 S. Ct. 10.

Carmichael case, adopted the reasoning of Mr. Justice Hand that it should not be imputed to Congress that it had the purpose of subjecting aliens "to the sport of chance" in stating a rule by which it could be determined whether or not an alien had made an "entry."[14] We cannot read into the reasoning of Mr. Justice Hand or Mr. Justice Douglas a construction requiring that it must be shown, in addition to having made a physical entry into the United States, that an alien had a present intention of making such an entry to come within the contemplation of the Immigration laws. For example, we do not understand the decision of the Supreme Court by Mr. Justice Douglas to rule out of the term "entry" the case of an alien who has been brought to this country under extradition proceedings for criminal prosecution. In such a situation the entry of the alien is not dependent upon the "sport of chance." Otherwise such a construction would tend to put an end to the extradition of criminals from a foreign country to stand trial for commission of a crime here. Such a result would undoubtedly make the United States a desirable place for the operation of foreign criminals because they would need only run the risk of failing to outdistance the officers to a foreign border to be free of criminal prosecution. This would be the result unless there is a basis for the legal theory suggested by the Second Circuit Court of Appeals that "there would seem to be statutory authority for the eventual removal of an alien whose entrance originally involuntary becomes clearly voluntary by his continued enforced stay. Compare 8 U. S. C. A. Secs. 154, 155; U S. *ex rel.* Ling Yee Suey v. Spar, 2 Cir., 149 F 2d 881, 883."[15]

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[14]*Di Pasquale v. Karnuth,* 2 Cir., 158 F. (2d) 878.

[15]*U. S. v. Watkin,* 164 F. (2d) 457.

It was not until after all of the testimony before the Immigration Board had been accepted and in fact after the decision of the District Court in the instant case that the principle announced by Mr. Justice Douglas[16] arose in determining what constituted an entry within the meaning of the Immigration laws. Appellee was not therefore questioned before the Immigration Board as to whether or not he intended to go foreign. He did, however, testify before the District Court in the writ proceedings on January 14, 1947, that after his shipment on the vessel "Edwin B. De Golia" he "was assigned then to go overseas" and that "the first trip on the SS 'Schenectady' was foreign ports in the South Pacific and Atlantic" and that he went straight to Australia [R. 68, 69] and that the "captain told us when we got out so many degrees where we had to go" [R. 72]. The departure manifest of the vessel "Schenectady" on the occasion of the departure in question described its voyage as foreign [R. 100].

No consideration is here being given to the theory advanced by the District Court that being a member of the United States military service appellee was never out of the United States in legal contemplation [R. 44, 45, 50, finding of fact 13]. It is not entirely clear whether the District Court advances the above theory on the basis of appellee's being in the United States military service or because he was a seaman engaged in the war effort and that his domicile could at all times be considered in the United States. There is no competent evidence showing appellee was in fact a member of the United States Navy or United States Naval Reserve. The appellee concludes in effect that the United States Maritime Service

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[16]*Delgadillo v. Carmichael,* note 3, *supra.*

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[16]*Delgadillo v. Carmichael,* note 3, *supra.*

was a branch of the United States Navy and that, therefore, he was in fact a reserve officer in the United States Navy. This legal conclusion on his part is totally uncorroborated by the documentary evidence presented by him. Whether or not an alien is arriving from a foreign port or place must be determined in the light of the Immigration laws and cannot be determined by other laws relating to what constitutes domicile.

Respectfully submitted,

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APPENDIX.

PARTIAL INDEX TO THE IMMIGRATION AND NATURALIZATION SERVICE FILE #5509810 T 1 [R. 55, 98, 99].

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Ex. Nos.	Title	Page Nos. (Red Figures)
1	"Ninian", manifest of arrival 11/17/24	183, 252, 253, 225, 222, 221, 219, 201
2	Alien registration record	182, 251, 252, 303-300, 299, 248, 235, 234, 230, 218, 214
3	Affidavits; John Delaney, William Giles—delayed birth certificate application	181, 245, 241, 232, 212, 211
4	Affidavits; Kenneth L. Higgins—John Delaney, delayed birth certificate application	180, 245, 241, 232, 212, 211
5	Marine navigation license of John Delaney	179, 245
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9	Kenneth L. Higgins' statement concerning acquaintance with John Delaney	175-171, 244, 250, 249, 241

Ex. Nos.	Title	Page Nos. (Red Figures)
22	War Department report re destruction of certain records	315, 304
23	Investigation of claimed employment of John Delaney at various shipyards in New York and New Jersey	314-308, 304-300, 249, 233